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No. 81-35

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION BY APPELLEE TO DISMISS APPEAL

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QUESTION PRESENTED

Should this appeal from the Alaska Supreme Court be dismissed on the grounds: (1) that the judgment appealed from rests on an adequate non-federal basis; and (2) that the federal question sought to be reviewed was not properly raised before and passed upon by the Alaska Court.

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INTRODUCTION

This case involves an appeal from an opinion of the Alaska Supreme Court (not yet reported; appears in Appendix I), announced January 26, 1981. Rehearing in this case was denied by the Alaska Court on April 6, 1981, and mandate issued April 7, 1981.

The Alaska Court held that, because appellant, Jack Van Hyning — a former member of the faculty at appellee, University of Alaska — failed to properly exhaust his administrative remedies following an adverse tenure decision, it would not address appellant's federal constitutional claim that he was denied due process of law under the procedure pursuant to which he was denied tenure.

Appellee hereby moves to dismiss this appeal on the grounds: (1) that the judgment of the Alaska Court rests on an adequate non-federal basis; and (2) that the federal question sought to be reviewed was not properly raised before and passed upon by the Alaska Court. Supreme Court Rule 16.1(b).

Appellee also requests that this Court deny appellant's alternative petition for certiorari on the grounds: (1) that no substantial federal question meriting plenary consideration by this Court has been raised by appellant; and (2) that the Alaska Court below did not address the federal questions presented to this Court. Supreme Court Rule 17.1(c).

Alternatively, in the event that this Court notes jurisdiction or possible jurisdiction or is inclined to grant certiorari, this Court should remand the case back to the Alaska Court for consideration of (a) a further dispositive issue of state law and (b) the federal questions raised by appellant.

STATEMENT OF CASE

I. FACTUAL BACKGROUND.

Jack Van Hyning, Ph.D. (hereinafter "Van Hyning"), was hired by the University of Alaska (hereinafter "U of A") as an associate professor of fisheries biology for the 1968 academic

year under a one-year contract of employment. [R. 155] Van Hyning's contract of employment was renewed by the U of A on an annual basis thereafter for the 1969-73 academic years. [R. 155]

No representations concerning Van Hyning's continued employment with the U of A were ever made by the U of A to Van Hyning. [R. 157] And Van Hyning was well aware of the probationary status of his employment. [R. 157]

A tenure system was in effect during Van Hyning's entire employment with the U of A which was formalized in January, 1971. [R. 155] If tenure was not offered to a faculty member by the end of his sixth year of probationary employment, he would no longer be retained on a full-time basis, but remained eligible for rehire on a part-time basis. [R. 155]

The U of A's tenure system was premised upon the following general policy:

> "Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the 'tenure or out' policy will serve as an active force in the development and maintenance of excellence in faculty and programs." [Appendix II, at 6a]

Tenure decisions at the U of A followed a multi-tiered evaluation of each faculty candidate's effectiveness in teaching, research, faculty relationships, professional societies, and university and public services. [Appendix II, at 7a-10a] The evaluation process began after the completion of the candidate's fourth year of eligible service. [Appendix II, at 7a] The first step in the process was a review of and recommendation on the candidate by the head of his faculty department, followed by similar reviews and recommendations by the appropriate deans and vice president. [Appendix II, at 8a-9a] The next step was a review by the U of A committee on tenure, which was comprised of faculty members elected by their peers. [Appendix II, at 5a-6a, 9a-10a]

The tenure committee made an independent evaluation of each candidate based upon such reviews and recommenda-

tions and such supplemental information as the committee deemed appropriate. [Appendix II, at 9a-10a] The committee then made a recommendation to the U of A president as to whether tenure should be offered to the candidate, and the president notified the candidate of his decision. [Appendix II, at 9a] A candidate who was denied tenure during his fifth year of service could request reconsideration of the decision by the president and appeal the result to the Grievance Committee of the University Assembly. [Appendix II, at 10a; Appellant Jack Van Hyning's Supplemental Brief as to the Exhaustion of Administrative Remedies Below, filed with the Alaska Supreme Court, at 2]

Near the end of Van Hyning's fifth year of service with the U of A, he was informed by the U of A president that he would not be offered tenure based upon the recommendation of the tenure committee. [R. 155] Van Hyning never requested any statement of reasons for the denial of tenure to him; nor was one given to him. [R. 156]

Van Hyning declined to seek an appearance before the tenure committee to present information on his behalf. [R. 156] Van Hyning also declined to exercise his rights to request reconsideration of the tenure decision by the U of A president and to appeal the tenure decision to the U of A Grievance Committee. [R. 156; Appellant Jack Van Hyning's Supplemental Brief as to the Exhaustion of Administrative Remedies Below, filed with the Alaska Supreme Court, at 2]

Van Hyning neither sought nor had the right to inspect any information which the tenure committee considered in making its recommendation to the president. [R. 156] Nor did Van Hyning seek or have the right to cross-examine faculty members whom the tenure committee had interviewed. [R. 156]

Following the denial of tenure, Van Hyning accepted a terminal one-year contract of employment with the U of A and thereafter voluntarily resigned from the U of A faculty effective June, 1973. [R. 155] However, Van Hyning has continued since then to teach on a part-time basis at the U of A. [R.

36-37] Van Hyning never applied for employment at any other academic insitution following his resignation from the U of A. [R. 34]

II. PROCEDURAL BACKGROUND.

In May, 1976 — four years after he was denied tenure by the U of A — Van Hyning filed suit against the U of A in the Alaska Superior Court, claiming that the U of A tenure procedure violated his state and federal due process rights. The U of A responded by filing a motion to dismiss all of Van Hyning's claims under Ak. R. Civ. Pro. 12(b)(6). This motion was, in effect, treated by the trial court as a motion for summary judgment, because additional evidence was submitted by both parties. *Compare* Ak. R. Civ. Pro. 56(c) *with* Fed. R. Civ. Pro. 56(c); *see Sament v. Hahnemann Medical College and Hospital*, 413 F. Supp. 434, 442-43 (E.D. Pa. 1976).

The trial court granted the U of A's motion on the grounds: (1) that all of Van Hyning's claims were barred by the applicable state statute of limitations, AS 09.10.070, because he did not file his suit against the U of A within the requisite two-year time period; and (2) that the U of A's denial of tenure to Van Hyning did not deny him any liberty or property interests in violation of his state or federal due process rights.

Van Hyning appealed the trial court decision to the Alaska Supreme Court, contending: (1) that a six-year statute of limitations, AS 09.10.050, rather than the two-year statute of limitations, was controlling in this case; and (2) that the U of A's tenure procedure violated his state and federal due process rights. Following the completion of briefing, the Alaska Court ordered supplemental briefing, *sua sponte*, on the issue of whether Van Hyning had properly exhausted his administrative remedies prior to bringing suit against the U of A.

Following such supplemental briefing, the Alaska Supreme Court ruled that Van Hyning had failed to properly exhaust his administrative remedies before bringing the case, because: (1) he did not request any appearance before the tenure committee; and (2) he did not request reconsideration of the adverse

tenure decision by the U of A president. Such grounds being adequate to dispose of all of Van Hyning's claims, the Alaska Court declined to address either the due process or statute of limitations issues that were relied upon by the trial court.

APPLICABLE STANDARD OF REVIEW

I. GENERAL PRINCIPLES OF SUPREME COURT REVIEW

This Court has the jurisdiction to review final decisions by the highest courts of states which uphold the validity of state statutes against federal claims. 28 U.S.C. §1257(2). Such jurisdiction has even been construed to apply to state court decisions upholding administrative orders which are legislative in character. *Hamilton v. Regents of University of California,* 293 U.S. 245, 257-58 (1934).

However, this Court will usually decline to review state decisions on federal questions if such decisions are supported by independent and adequate state procedural grounds. Wright and Miller, *Federal Practice & Procedure* §4019, at 661-62 (1977).

> "The Supreme Court retains jurisdiction and authority to determine whether federal law should displace state law generally on a given matter; to determine whether there is any possible outcome of a federal issue that would require a different result than state grounds; and to determine the adequacy of state grounds that, if adequate, would independently sustain the judgment." Wright and Miller, *Federal Practice & Procedure* §4021, at 695-96 (1977); *see Wolfe v. State of North Carolina,* 364 U.S. 177, 186 (1960).

II. APPLICATION OF STATE PROCEDURE TO FEDERAL CLAIMS.

These general principles of review require a two-step analysis: (1) Did the highest court of the state finally decide the matter on the basis of state law independent from the asserted federal claims? (2) Were those independent state grounds adequate?

Under the first step of the analysis, state procedural rules are no less applicable in state courts when federal rights are in controversy than when state law is controlling. *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); Wright and Miller, *Federal Practice & Procedure* §4023, at 706 (1977).

> "Once an effective remedy is made reasonably available, state procedural limitations remain generally independent of the federal law, and need only survive the basic test of adequacy." Wright and Miller, *Federal Practice & Procedure* §4024, at 725 (1977).

Under the second step of the analysis, state courts may decide cases on adequate state procedural grounds, but such decisions may not avoid federal claims on the basis of non-federal grounds: (1) which lack "fair or substantial support," *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960); (2) which violate federal due process standards, *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964); (3) which constitute an "evasion" of federal rights, *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904); (4) which interpose "unreasonable obstacles" to the assertion of federal rights, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); (5) which "discriminate" against federal rights, *Wolfe v. North Carolina*, 364 U.S. 177, 192 (1960); or (6) which constitute an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). *See, generally*, Wright and Miller, *Federal Practice & Procedure* §4021-28 (1977).

Despite these numerous tests for the review of state court decisions, this Court has traditionally awarded great deference to the independence of state procedure. And the general standard of review of such cases by this Court

> "is that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights." Wright and Miller, *Federal Practice & Procedure* §4028, at 747 (1977).

ARGUMENTS

I. THE ALASKA SUPREME COURT'S FAILURE TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS WAS BASED UPON INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUNDS.

The Alaska Supreme Court declined to address Van Hyning's federal due process claims because he failed to comply with the state procedural requirement that he first duly exhaust all available administrative remedies before commencing suit to vindicate such rights.

According to the Alaska Court: (a) Van Hyning's failure to exhaust his administrative remedies deprived the U of A of an opportunity to take further administrative action that might have resulted in a different tenure decision; (b) Van Hyning's contention that any further administrative action would have been "futile" was unsupported by the record on appeal and essentially incapable of verification; and (c) Van Hyning's lengthy delay in filing suit deprived the trial court of an opportunity to retain jurisdiction and remand the case for exhaustion of administrative remedies, due to intervening commitments by the U of A and personnel changes in the tenure committee. *See Gusik v. Schilder,* 340 U.S. 128, 133-34 (1950); *Whe[illegible]hel v. McDonald,* 340 U.S. 322, 326 (1950); *Montgomery v. Rumsfeld,* 572 F.2d 250, 253-54 (9th Cir. 1978); *Jerrell v. Kenai Peninsula Borough School District,* 567 P.2d 760, 767 (Ak. 1977).

Under such circumstances, the Alaska Court's election to raise the exhaustion of administrative remedies issue *sua sponte* and, after adequate opportunity for briefing, to decide the case on that issue, properly fell within its discretionary limits. The raising of a determinative issue *sua sponte* by an appeals court is generally accepted appellate practice. *See Patten v. New York,* 445 U.S. 573, 582 n.19 (1980). And the doctrine of exhaustion of administrative remedies is a generally accepted principle of both Alaska and federal law. *See, e.g., Parisi v. Davidson,* 405 U.S. 34, 37 (1972); *Republic Steel Corp.*

v. Maddox, 379 U.S. 650, 652-53 (1965); *Sullivan v. Pacific and Arctic Rwy. and Nav. Co.*, 439 F.2d 267, 273-74 (9th Cir. 1971) (applying Alaska law); 3 Davis, *Administrative Law Treatise* §§20.01-.10 (Supp. 1970).

No reported cases have been discovered where this Court has considered the omission of a state court to pass on a federal claim based upon the claimant's failure to exhaust his administrative remedies. However, in *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court recently considered a federal district court's application of the exhaustion doctrine in a suit challenging the constitutionality of the administrative procedure for terminating disability benefits under Title II of the Social Security Act, 42 U.S.C. §301, §423, *et seq.*

In *Eldridge* the entitlement of a disability benefit claimant (Eldridge) was reviewed by the state agency charged with monitoring his medical condition. After considering medical information obtained from Eldridge, the state agency made a determination of non-disability. This determination was accepted by the Social Security Administration, which had been delegated authority to do so by the Secretary of Health, Education and Welfare. The Social Security Administration notified Eldridge that his benefits would be terminated, but that he had the right to seek reconsideration of that determination by the state agency. Instead of requesting reconsideration, Eldridge immediately commenced suit in federal district court against the Secretary, challenging the constitutionality of the benefit-termination procedures established by the Secretary and seeking immediate reinstatement of his benefits pending a full evidentiary hearing on the issue of his disability. 424 U.S. at 324-25.

The Secretary moved to dismiss Eldridge's claims on the grounds: (1) that his benefits had been terminated in accordance with valid administrative regulations and procedures; and (2) that he had failed to exhaust available administrative remedies. In response, the district court held that, prior to terminating Eldridge's federal disability benefits, the state agency charged with administering the program had to afford him a full evidentiary hearing of the type required for welfare

beneficiaries under Title IV of the Social Security Act. *Compare Goldberg v. Kelly*, 397 U.S. 254, 266-271 (1970). The district court's decision was affirmed on appeal by the Fourth Circuit. This Court reversed, holding that a full evidentiary hearing was not required prior to terminating disability benefits. 424 U.S. at 349.

In reaching this decision, this Court concluded that the denial of Eldridge's benefit claim constituted a final administrative decision sufficient to permit federal court review of his constitutional claims. 424 U.S. at 328. This Court also stated that Eldridge was not required to further exhaust the additional administrative remedies available to him because: (1) his constitutional claim was entirely collateral to his substantive claim of disability benefit entitlement; and (2) he had raised at least a colorable claim that an erroneous denial of disability benefits to him would damage him in a way not recompensable through retroactive benefit payments. 424 U.S. 319, 330-31; *see Holman v. Califano*, 83 F.R.D. 488, 491 (M.D. Pa. 1979).

This Court's decision in *Eldridge* was obviously dictated in large part by the particular exigencies of Eldridge's disability compensation needs, because it was reached *despite:* (1) this Court's express acknowledgment that exhaustion of administrative remedies was a "jurisdictional prerequisite" to judicial review, 424 U.S. at 327; (2) this Court's observation that the administrative agency may have found favorably for Eldridge upon reconsideration, 424 U.S. at 346-47; (3) this Court's conclusion that the Secretary did not waive the exhaustion requirement, 424 U.S. at 328; and (4) this Court's many precedents requiring exhaustion. *See, generally*, 3 Davis, *Administrative Law Treatise* §§20.00-.00-1 (Supp. 1980).

Van Hyning's circumstances are distinguishable from the exigent factual situation that led to this Court's decision in *Eldridge*. While Van Hyning's constitutional challenge to the U of A tenure system may be collateral to his substantive claim of tenure entitlement, he has failed to raise any "colorable claim" that an erroneous tenure decision by the U of A would damage him in a way not recompensable through

retroactive relief. Unlike Eldridge, Van Hyning is not seeking to prevent the loss of a vested benefit (disability payments) upon which he relies, but rather is seeking a benefit (tenure) to which he believes he is entitled.

A denial of disability benefits is also hardly analogous to a denial of tenure, because there is not the same urgency for judicial review of an adverse tenure decision as there is for judicial review of a denial of disability benefits. While Eldridge sought and argued that he required immediate judicial relief from the adverse disability benefit decision that he suffered, Van Hyning waited over four years to seek judicial review of the adverse tenure decision that he suffered. Van Hyning also failed to demonstrate that he would be irreparably harmed if he did not bypass the final administrative reconsideration procedure and go directly to court, as Eldridge did.

Finally as noted above, this Court traditionally defers whenever possible to the application of adequate state procedure to independently dispose of federal claims. Such deference would be particularly appropriate in the present case, because it involves the application of state procedure to federal claims, while *Eldridge* involved the application of federal procedure to federal claims. This Court should, therefore, defer to the Alaska Supreme Court's application of state procedure in this case, unless it is willing to categorically determine that such procedure, as applied in this case, violated federal due process standards. To do otherwise would unreasonably extend the narrow holding of *Eldridge* and impair the credibility of the doctrine of exhaustion of administrative remedies. *See* 3 Davis, *Administrative Law Treatise* §§20.00-.00-1 (Supp. 1980).

II. THE RECORD ON APPEAL IS INSUFFICIENT TO DECIDE APPELLANT'S FEDERAL CONSTITUTIONAL CLAIMS BASED UPON THE ROTH AND SINDERMANN CASES RELIED UPON.

All of Van Hyning's federal constitutional claims are based upon two seminal decisions of this Court, *Board of Regents v.*

Roth, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). In these cases, this Court considered the fundamental question of whether a decision not to renew an employment contract of a non-tenured university professor without a sufficient hearing violated the professor's due process rights under the Fourteenth Amendment.

A. SUMMARY OF THIS COURT'S HOLDING IN ROTH.

Roth involved a university professor (Roth) who had been hired for a fixed one-year academic term. Upon completion of that year of employment, Roth was notified that he would not be rehired for the succeeding academic year. Roth had no tenure rights.

On appeal to this Court, Roth argued that the university's failure to accord him a hearing prior to the non-renewal of his employment contract deprived him of property and liberty interests guaranteed by the Fourteenth Amendment. In addressing Roth's claim, this Court first considered whether Roth's interests in his continued employment with the university were protected by the Fourteenth Amendment.

> "To have a property interest [protected by the Fourteenth Amendment] in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

This Court then went on to hold that whatever property interests Roth had in his continued employment with the university were created by state law or by the terms of his faculty appointment by the university.

No state statute, university rule or policy secured any interest in Roth's reemployment or gave rise to any legitimate expectation by Roth that he would be reemployed at the end of his initial one-year term. And no provision in Roth's appointment to the university faculty provided for the renewal of his employment with the university after his initial one-year contract expired. As a result, this Court concluded that Roth did not have a sufficient property interest in his continued

employment with the university to require that the university give him a full evidentiary hearing prior to declining to renew his contract of employment. 408 U.S. at 578.

In arriving at this decision, this Court noted that, had the university made a charge against Roth bringing into issue his good name, reputation, honor or integrity in connection with the non-renewal of his contract, it might have decided the case differently.

> "For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' . . . In the present case, however, there is no suggestion whatever that [Roth's] 'good name, reputation, honor, or integrity' is at stake." 408 U.S. at 573 (footnotes and citations omitted).

This Court also noted that the State's declination to re-employ Roth did not adversely impact his future career interests and employment opportunities.

> "Similarly, there is no suggestion that the State, in declining to re-employ . . . [Roth], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573.

This Court then went on to criticize unwarranted assumptions by the District Court and Court of Appeals below to the effect that the mere non-retention of Roth by the university had created such an adverse inference or impact. 408 U.S. at 574 n.13.

> "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575.

B. SUMMARY OF THIS COURT'S HOLDING IN SINDERMANN

Sindermann involved the non-retention of a professor

(Sindermann) who had been employed by the Texas state college system for ten consecutive years. During his employment, Sindermann became involved in a series of public disagreements with the policies of the board of regents.

At the end of his tenth year of employment, Sindermann was notified by the board of regents that his contract would not be renewed for the succeeding academic year. This notice was accompanied by a press release by the board alleging insubordination by Sindermann. Sindermann was allowed no opportunity for any hearing to rebut the allegations of misconduct.

On appeal to this Court, Sindermann claimed that the board of regent's failure to provide him with a full evidentiary hearing on his non-retention violated his due process rights under the Fourteenth Amendment. At the core of his claims was an allegation that the non-renewal of his contract was in reprisal for the exercise of his constitutionally protected right of free speech to criticize the board. 408 U.S. at 598. As a result, this Court concluded that Sindermann had stated a bona fide federal constitutional claim concerning deprivation of his free speech rights.

The college that employed Sindermann had no formal tenure system, but had created an implied tenure system which Sindermann and other faculty members could have relied upon to form a legitimate expectation of continued employment. As a result, this Court held that Sindermann could have had more than a mere subjective expectation of continued employment and remanded the case back to the state court for a determination as to whether, under applicable state law, Sindermann had a property interest in his continued employment. 408 U.S. at 602-03.

C. THIS CASE IS SIMILAR TO ROTH AND DISTINGUISHABLE FROM SINDERMANN.

The record on appeal in this case clearly indicates that, like in *Roth*, the U of A made no charges against Van Hyning in denying him tenure that placed his good name, reputation, honor

or integrity in issue or seriously damaged his standing and associations in his community. Nor does the record in this case contain any suggestion or proof to the effect that Van Hyning suffered any stigma or other disability that foreclosed his freedom to take advantage of other career and employment opportunities.

On the contrary, the record in this case demonstrates that Van Hyning has never even applied for similar full-time employment at any other academic institution and has continued to work at the U of A on a part-time basis since the U of A's denial of tenure to him. Van Hyning's claim that no other commensurate employment is available at any other university in Alaska also lacks support in the record. And, even if such claim were true, it is not a sufficient reason to require the U of A to afford him a full evidentiary hearing prior to denying him tenure, because such a requirement would condition the granting of due process rights on the availability of similar employment elsewhere.

Nor does the U of A tenure policy provision that it "will be rigorous, providing assurance that persons of doubtful qualifications will not be retained" or the provision that the policy is based upon a "tenure or out" premise, without further support in the record, support Van Hyning's contention that the U of A's denial of tenure to him implied that he was incompetent, any more than mere non-retention implies severe career difficulties or a lack of future employment opportunities. *See* 408 U.S. at 574 n.13. And, despite Van Hyning's urging to the contrary, no more than a semantical distinction can be made between a denial of tenure which results in non-retention and a non-retention without a tenure decision.

Further, this Court did *not* hold in *Sindermann* or *Roth* that an inference of a legitimate expectation of continued employment can be drawn from the mere fact of employment for a number of years as a non-tenured professor. As a result, no legitimacy may be accorded to Van Hyning's argument that he had a full expectation of continued employment with the U

of A, because he suffered no contrary indication and his contract was renewed on an annual basis for five consecutive years prior to the adverse tenure decision.

Since the U of A, unlike Sindermann's college, had an express tenure system, Van Hyning also cannot claim that tenure may have been conferred upon him on a *de facto* basis, as did Sindermann. Unlike in *Sindermann*, the record on appeal in this case is totally devoid of any contractual terms or university rules, practices or standards which would have given Van Hyning a sufficiently objective expectation of continued employment to create a property interest.

The record in this case is devoid of any proof to the effect that Van Hyning's expectation of tenure was anything more than a unilateral one. Nor is there any evidence that tenure offers, rather than denials, were generally expected by faculty members at the U of A in Van Hyning's position at the time tenure was denied him. There is also no proof whatsoever in the record that Van Hyning suffered any damage to his career interests or lost any future employment opportunities as a result of U of A's denial of tenure to him. As this Court pointed out in *Roth*, such an assumption may not be made without proof in the record to the contrary, 408 U.S. at 574 n.13; and a person is not deprived of any federal constitutional rights when he is merely not rehired in one job and remains free to seek another, 408 U.S. at 575.

In sum, the record on appeal fails to support the federal constitutional claims raised by Van Hyning. To reach such claims, this Court would be required to draw inferences and make factual findings which are unwarranted based upon the record on appeal. A firmer factual basis than naked unsupported allegations by a claimant is required to support constitutional litigation. *Perkins v. Regents of University of California*, 353 F. Supp. 618, 622 (C.D. Calif. 1973).

III. IF THIS COURT CONCLUDES THAT THE ALASKA SUPREME COURT WRONGFULLY DECLINED TO ADDRESS VAN HYNING'S FEDERAL CONSTITUTIONAL CLAIMS BELOW, IT SHOULD REMAND

BACK TO THE ALASKA COURT FOR CONSIDERATION OF A FURTHER DISPOSITIVE ISSUE OF STATE LAW.

The trial court below held that all of Van Hyning's federal constitutional claims were barred by the applicable state statute of limitations, AS 09.10.070, because he did not file suit within the requisite two-year time period. Even though the statute of limitations was dispositive of all of Van Hyning's claims, the trial court went on to conclude that the U of A's denial of tenure to him did not deny him any liberty or property interests in violation of his federal or state due process rights.

When Van Hyning appealed the trial court's decision to the Alaska Supreme Court, the Alaska Court affirmed the decision without approving the trial court's reasoning, concluding that all of Van Hyning's claims were barred because he had failed to exhaust his administrative remedies prior to bringing suit. In doing so, the Alaska Court did not address the state statute of limitations issue, which was also dispositive of all of Van Hyning's claims.

This Court has observed that a state court may deny a federal claim on the basis of a state statute of limitations. *Ward v. Love County*, 253 U.S. 17, 25 (1920). As a result, assuming, *arguendo*, that the Alaska Supreme Court wrongfully avoided Van Hyning's federal claims by applying the doctrine of exhaustion of administrative remedies, the issue of whether such claims are barred by the applicable state statute of limitations must still be considered before this Court addresses the merits of Van Hyning's federal claims.

In *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), this Court assumed that a state appeals court had rejected a state statute of limitations defense to certain federal constitutional claims based upon the fact that the state court had addressed the merits of such claims. In dissent, Justice Powell noted that this Court has consistently taken the position that:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should

> stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." 440 U.S. at 268, *quoting Harris County Comm'rs. Court v. Moore*, 420 U.S. 77, 83 (1975).

Justice Powell then went on to disagree that the state statute of limitations issue had been necessarily addressed by the state court and criticized the majority for assuming that it had in an effort to reach the underlying constitutional issues.

> "I find the Court's insistence upon reaching and deciding the merits quite irreconcilable with the long-established doctrine that we abstain from reaching the federal constitutional claim that is premised on unsettled questions of state law without first affording the state courts an opportunity to resolve such questions. I would therefore remand the case. . . ." 440 U.S. at 268-69.

Unlike in *Orr*, it is clear that the Alaska Supreme Court in this case did not address the U of A's statute of limitations defense; and it cannot be assumed that it did in order to reach Van Hyning's federal claims. As a result, if this Court concludes that the Alaska Court wrongfully declined to address Van Hyning's federal constitutional claims, it should remand the case back to the Alaska Court with a mandate to consider the U of A's statute of limitations defense. In addition to complying with principles of abstention, such a course of action would allow the Alaska Court to address Van Hyning's federal claims on their merits before this Court considers such claims. *See Perry v. Sindermann*, 408 U.S. 593, 603 (1972).

CONCLUSION

For all of the foregoing reasons, Van Hyning's appeal to this Court should be dismissed on the grounds: (1) that the judgment of the Alaska Court below rests on an adequate nonfederal basis; and (2) that the federal questions Van Hyning seeks to have reviewed by this Court were not properly raised before and passed upon by the Alaska Court. Supreme Court Rule 16.1(b).

This Court should also deny Van Hyning's alternative petition for certiorari on the grounds: (1) that no substantial federal question meriting plenary consideration by this Court has been raised by Van Hyning; and (2) that the Alaska Court below did not address the federal questions presented to this Court. Supreme Court Rule 17.1(c).

Alternatively, in the event that this Court notes jurisdiction or possible jurisdiction or is inclined to grant certiorari, this Court should instead remand the case back to the Alaska Court for consideration of (1) further dispositive issues of state law and (2) the federal claims in question.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 21st day of August, 1981.

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APPENDIX

APPENDIX I

THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Appellant.	)	
	)	File No. 4022
v.	)	
	)	OPINION
UNIVERSITY OF ALASKA,	)	
	)	
Appellee.	)	
	)	[No. 2267 - January 16, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Mark C. Rowland, Judge.

Appearances: Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for Appellant. Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.*

MATTHEWS, Justice.

Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van Hyning's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the

*This case was submitted to the court for decision prior to Justice Boochever's resignation.

probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to.[1] The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statement of reasons for recommending denial of tenure was provided. Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30,

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[1]Although we can find no such provision in the tenure policy, the parties stipulated that Van Hyning would have been entitled to appear before the tenure committee had he desired to do so.

1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12 (b) (6)[2] was granted. The superior court found that the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure. This appeal followed.

We conclude that the judgment should be affirmed because of Van Hyning's failure to exhaust his administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 31 L.Ed.2d 17, 25 (1972). *See generally* 3 K. Davis, Administrative Law Treatise §§ 20.01-.10 (Supp. 1970). Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have included a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

If Van Hyning had promptly challenged the tenure committee's decision in court without first exhausting his administrative remedies, the court, in its discretion, might properly have required him to exhaust those remedies while retaining jurisdiction in the event that doing so did not bring

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[2]The University's motion was treated as a motion for summary judgment under Alaska R. Civ. P. 56.

him acceptable relief.[3] However, when the court made its ruling such discretionary relief had become, in all probability, impractical[4] due to Van Hyning's four year delay in filing suit, because of intervening commitments made by the University and changes in personnel among the decision makers.

The judgment is AFFIRMED.

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[3]*See* Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[4]In Jerrell v. Kenai Peninsula Borough School District, 567 P.2d 760, 767 (Alaska 1977), we recognized the "practical concerns" of an educational institution relating to its ability "to effectively plan future hiring." "Prompt decisions on whether a teacher is to be retained are of considerable importance in determining the personnel to be hired for the ensuing school years."

APPENDIX II

UNIVERSITY OF ALASKA

FACULTY BULLETIN

No. 1970-71-5
January 27, 1971

Following review of the recommendation from the University Assembly concerning modification of the University Tenure Policy, the Board of Regents took action at their May and October 1970 meetings. The entire modified Tenure Policy is set forth herewith.

PROCEDURES FOR GRANTING TENURE

The primary function of a university is to provide for continual critical examination of the tenets of truth and for the preservation and extension of these tenets. To accomplish this function, the University must assemble a community of faculty and students, and must provide for them an environment that encourages free and honest inquiry, free expression of ideas, and the development of critical capacities. The primary purpose of a tenure policy is to assure the academic community of such an environment, one that will nurture the pursuit of knowledge, wisdom, and ultimately truth. Such a policy gives the faculty member freedom to teach and study, but it does not release him of his responsibility to maintain high standards of professional integrity and to contribute his maximum to the academic community.

I. UNIVERSITY COMMITTEE ON TENURE

A University Committee on Tenure will consider and advise the President on matters relating to tenure. This Committee shall be composed of seven tenured members of the faculty, chosen for their wisdom and maturity in professional matters. All committee members shall be of the rank of Associate Professor or above; their university duties shall be primarily in

teaching, research, public service, or professional-level service activity. They shall have had at least twelve years of academic experience, preferably at two or more institutions. Committee members shall be chosen for their professional maturity, rather than their affiliation with a particular discipline or administrative unit. They shall be elected for a term of three years by the University Assembly from a slate of candidates presented by a nominating committee selected from among eligible professional personnel of the University Assembly. The slate shall include at least two candidates for each vacancy on the Tenure Committee. Not more than two candidates shall be from the same college, institute, or other major administrative unit of the University. The Committee will elect its own chairman annually.

II. CONDITIONS FOR THE GRANTING OF TENURE

A. To be eligible for consideration for tenure, a person

1. must hold a full-time professional appointment, controlled by the University, and

2. must hold the rank of Assistant Professor or above (or its equivalent in research or service title), and

3. must hold a professional title apart from any administrative assignment, since eligibility for tenure does not extend to administrative positions.

B. Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous, full-time service at the rank of Assistant Professor (or equivalent) or above. This provision does not apply to professional staff members whose duties are essentially administrative (less than 50% teaching, research, or public service) or to professional staff members who have attained academic rank other than through regular, systematic review procedures. Tenure in academic rank may be granted to administrative personnel when their qualifications for this assignment are established through regular channels. Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

Six years above the rank of Instructor (or equivalent) is a maximum probationary period; tenure may be offered by the President upon appropriate review after a 0-5 year period at the University. However, a person who has served a term of probationary service of more than three years in one or more institutions of higher learning should not be required to serve a probationary period of more than four years. The terms and conditions of every appointment to the faculty will be stated or confirmed in writing, and a copy of the appointment document will be supplied to the faculty member. Any subsequent extensions or modifications of an appointment, and any special understanding, or any notices incumbent upon either party to provide, will be stated or confirmed in writing and a copy will be given to the faculty member.

C. If tenure is offered but declined by a person, the terms of the tenure policy shall be deemed to have been fulfilled and the person may be retained.

D. Associate and Full Professors (or equivalent) who have received an unconditional seventh (or more) continuous contract by 1 July 1966 automatically will be deemed to have been offered tenure as of that date.

E. A faculty member shall be judged on the basis of his total potential contribution to the University when he is being reviewed for tenure. The following criteria will be considered, giving cognizance to the candidate's university assignment:

1. Effectiveness of Teaching: Scholarly level exhibited, creative preparation and presentation of materials, commitment to high academic standards, awareness of students' concerns, and the ability to stimulate and guide them to a high level of achievement; interest in developing methods for imparting the subject matter to the student; participation in curriculum development; recognition of the student as an individual; and effectiveness at individual counseling.

2. Effectiveness of Research: Scholarly level exhibited, commitment to high academic standards, original approach to problems, quality of published and unpublished contributions to knowledge, professional growth as reflected by publications and other creative work, recognition by his peers.

3. Effectiveness in professional-level service extending or supporting teaching or research. Demonstrated competence as an informal instructor or disseminator of information in special field; ability in motivating people to analyze and solve their own problems; appropriate academic background and evidence of continued professional growth; competence in working successfully with others on an individual basis; evidence of insight into community and state problems related to areas of University responsibility; recognition and respect for creative productivity and participation in significant activities of special professional field.

4. Other Criteria.

a. Personal relationships as a member of the faculty: Professional ethics and principles, judgment and tact, cooperativeness, resourcefulness, and responsibility.

b. Participation in professional societies of state or national scope; offices held, committee activities, addresses made.

c. University and public services: Committee work, administrative assignments, sponsoring of student organizations and projects; importance of service to the University, community, and the State.

III. PROCEDURES FOR THE GRANTING OF TENURE

A. The usual procedure for the initiation and processing of an application for tenure will be as follows:

1. Annually not later than 1 October each department head (or other appropriate administrative person) shall prepare a list of names of untenured persons in his department, or other administrative unit, who have completed their fourth year of eligible service. A copy of this list shall be forwarded to his dean or director and a copy to the cognizant vice president.

2. The department head will prepare, or cause to be prepared, a dossier setting forth the qualifications of each

such eligible person whom he intends to recommend (see Section II, "Conditions for the Granting of Tenure," for criteria). After consulting with senior members of his department as appropriate, he will forward this dossier, together with his recommendation and justification, to the appropriate dean or institute director no later than 15 November.

If the department head does not intend to recommend for tenure an eligible faculty member beginning his fifth year of continuous service, he shall prepare, no later than 15 October, a conditional memorandum to that effect, stating his reasons, and deliver the same through review counsel to the President.

3. The dean or institute director will add his recommendations and justifications to the dossier and forward the same to the appropriate vice president no later than 30 November.

4. The vice president will add his recommendations and justifications and forward the entire dossier to the President no later than 31 December.

5. The President will then seek from the University Committee on Tenure an independent evaluation on each candidate under consideration. He will provide the Committee with essential personnel records for review purposes.

6. The Committee will return the personnel records, together with its recommendations and justifications, to the President of the University no later than 1 February. If the Committee is not unanimously agreed on a recommendation, the vote, together with the reasons for the split vote, shall be included in the advisory recommendation.

7. As expeditiously as possible, the person concerned will be notified by the President of the decision on his case. However, notification will not be delayed beyond the date when new contracts are issued (normally about 30 March). The President will also notify both the vice presidents and the chairman of the Committee of his decision on each application; if the decision is contrary to the recommendations of the majority of the committee, he will state the reasons for his decisions.

8. At any stage in this procedure, the administrative officer or the Committee considering the application may request additional information from the person concerned, his administrative superiors, his tenured colleagues at the University of Alaska, or other qualified persons. However, such a request must not be allowed to delay the forwarding of the dossier according to the schedule outlined above.

B. Tenure applications may also be initiated by the individual concerned, the tenured faculty of the department, any administrator to whom the person is responsible, or the University Committee on Tenure. Such applications shall be forwarded through the normal channels as outlined in III A.

C. Under unusual circumstances, tenure applications may be initiated at times other than those indicated above. However, under such circumstances, the procedure outlined above will be followed, with appropriate changes in scheduled dates.

D. Tenure applications which have not been approved are subject to review without prejudice until the end of the fifth year of service.

A person who has been reviewed and not offered tenure during his fifth year of continuous service may request of the President reconsideration of his case.

IV. CONDITIONS FOR THE TERMINATION OF TENURE

A. Tenure will be terminated on 1 July following a faculty member's sixty-fifth (65) birthday. A faculty member over sixty-five (65) may continue to serve on an annual basis without tenure subject to approval by the President of the University.

B. A tenured faculty member may be terminated in case of prolonged medical disability, or financial exigency that prevents payment of salary. Should funds for the position vacated become available within two contract years following such termination for financial exigency the tenured faculty

member shall be invited to return. Should he decide not to accept the offer, he will immediately notify the University so that a suitable replacement may be made.

C. Except on the above grounds, termination of tenure shall be considered only in cases of dismissal for adequate cause.

A faculty member is to be considered for granting of tenure and dismissal for adequate cause in view of his professional integrity as a representative of his special field of qualification, of his profession, and of the University. The definition of adequate cause for dismissal cannot be made precise. The general areas of concern that obviously may generate charges sufficient for dismissal are unprofessional actions, unethical or immoral conduct, or professional incompetence. It is the responsibility of the University to dismiss for cause any member of its faculty who has lost his overall effectiveness in his University assignment as set forth in Section E of "Conditions for the Granting of Tenure."

V. PROCEDURES FOR THE DISMISSAL OF A TENURED FACULTY MEMBER FOR ADEQUATE CAUSE

A. The procedure to be followed in the event of dismissal of a tenured member for adequate cause shall be as follows:

1. Preliminary Proceedings: When the fitness of a faculty member is under question, the appropriate administrative officer shall ordinarily discuss the matter with him directly. If a mutually satisfactory adjustment of the matter does not result, the matter shall be referred to the University Committee on Tenure, augmented for this purpose by two administrative officers who are not immediately concerned with the case and who shall be appointed by the President. This augmented Committee shall make an informal inquiry, assist in arriving at an agreement if possible and, if none is effected, advise the appropriate administrative officer whether proceedings should be instituted toward a dismissal. If the appropriate administrative officer decides, either with or without the concurrence of the Committee, to begin proceedings, then he shall

formulate a statement setting forth the grounds proposed for dismissal, such statement to be presented to the augmented University Committee on Tenure.

2. Initiation of Formal Proceedings: The statement of the administrative officer shall then be incorporated in a letter from the president to the faculty member informing him that an inquiry to determine whether he should be removed from his faculty position on the grounds stated will be conducted by the augmented University Committee on Tenure, meeting at a specified time and place, sufficient time being allowed for the preparation of his defense, such period not to be less than 15 days. The faculty member shall be informed in detail of the procedural rights that will be accorded him, such as his right to counsel and the right to be informed completely of the evidence on which the grounds proposed for dismissal are based. In particular, the procedures specified in Section V.A. 4 below shall be made known to him. The faculty member shall reply to the President in writing whether he wishes a hearing at which he will be present and, if so, shall answer in writing, not less than one week before the date set for the hearing, the administrative officer's statement.

3. Suspension of the Faculty Member: Suspension of a faculty member during the proceedings against him may not be imposed unless it is necessary to avoid harm to individuals. Such suspension shall be with pay.

4. Proceedings of the augmented University Committee on Tenure: Committee considerations shall commence within 30 days after formal proceedings are initiated.

The Committee shall proceed by considering the statement of grounds for dismissal already formulated in the administrative recommendation for dismissal, said statement to be presented to the Committee together with the faculty member's response. If the faculty member has not requested a hearing, the Committee shall consider the case on the basis of available information and decide whether or not a hearing shall be held. Hearings shall be private unless the faculty member requests otherwise and the Committee concurs in the request. If any facts are in dispute, the testimony of witnesses

and other evidence concerning the charges shall be received.

The administrative officer initiating the dismissal proceedings or his representative shall present the evidence for dismissal. The Committee shall determine the order of proof, normally conduct the questioning of witnesses, and, if necessary, assure the presentation of evidence.

The faculty member shall have the option of assistance by counsel. The faculty member shall have the aid of the Committee and of the President in securing the attendance of witnesses. The faculty member or his counsel and the administrative officer initiating the proceedings or his representative shall have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member shall have the opportunity to be confronted by all witnesses adverse to him. If, in the judgment of the Committee, very unusual circumstances make this impossible, the identity of the witness, and his statements, shall be made known to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence shall be duly recorded. The record of the hearing shall be available to the faculty member. If a charge of incompetence is involved, testimony shall include that of teachers and other scholars in his discipline.

On the basis of the hearing the Committee shall reach its decision in conference, giving opportunity to the faculty member or his counsel and the administrative officer initiating the proceedings or his representative to summarize orally before it, and to submit written briefs if the Committee desires. The Committee shall then arrive at explicit findings with respect to each of the grounds for dismissal presented, and formulate its decision for or against removal of the faculty member. The President and the faculty member shall be notified in writing of the Committee's decision no later than 10 days after the close of the hearings. Each shall receive, as promptly as possible, and at the same time, a copy of the record of the hearing.

5. Decision by the President: A decision shall be rendered by the President no later than 15 days after notification by the Committee of their recommendation.

B. Public statements about the case by either the faculty member or administrative officers shall be avoided until the proceedings have been completed, except for such simple announcements as may be required concerning the time of the hearing and similar matters. Any release to the public shall be made through the President's Office.

VI. TERMINATION OF A NON-TENURED FACULTY MEMBER

Notice of non-reappointment, or of intention not to recommend reappointment shall be given in writing in accordance with the following procedures:

1. Not later than 1 March of the first academic year of service, if the appointment expires at the end of that year, or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than 15 December of the second academic year of service if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years at the University.

VII. NOTICE BY FACULTY MEMBER OF INTENT TO LEAVE

A faculty member should give six months' notice of his intent to leave the University.

This memorandum supersedes those of the same subject dated March 4, 1966 and December 6, 1968.

/s/_____
William R. Wood
President